IN THE

Supreme Court of the United States.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

No. 87.

AXEL W. HALLENBORG AND J. EDWARD ADDICKS,
Plaintiffs and Appellants,

against

COBRE GRANDE COPPER COMPANY, WILLIAM C. GREENE, CANANEA CONSOLIDATED COPPER COMPANY, impleaded with others,
Defendants and Appellees.

BRIEF FOR APPELLEES.

NORTON CHASE,
EUGENE S. IVES,
Of Counsel for Appellees.

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IN THE

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AXEL W. HALLENBORG, *et al.*,
Appellants,

vs.

THE GREEN CONSOLIDATED COPPER COMPANY, WM. C. GREENE, impleaded with COBRE GRANDE COPPER COMPANY, *et al.*,
Appellees.

BRIEF OF APPELLEES.

The findings of the court are as follows:

That Hallenborg owned 8,000 shares of the stock of the Cobre Grande Copper Company at the time the suit was commenced and at the time it was tried; that Addicks owned 5,000 shares; that at said times said Hallenborg was the owner and holder of the promissory notes set out in the complaint; that since prior to January 1st, 1900, the Cobre Grande Copper Company had been engaged in a series of law suits with defendants Mitchell and Greene and their associates in Sonora, Mexico, and in the county of Maricopa, Arizona, and in El Paso, Texas, and in the State of New York. That the suit in Maricopa County was commenced on the 25th of November, 1899, and is known as No. 3437; that in said suit the Cobre Grande Company was plaintiff and defendants Greene, Mitchell, and the

Phoenix National Bank were defendants; that in said suit the Cobre Grande Copper Company alleged among other things in substance all the facts set forth in paragraph 3 of plaintiff's original complaint on file in this action, and prayed that Greene be required to account to the Cobre Grande Company for the proceeds of the products of said mines and mining claims mentioned in plaintiff's complaint together with the supplies, material and property of the Cobre Grande Company alleged to have been taken and appropriated by him. That issues were joined by defendants in said action; that the case was tried on the issues involved and finally submitted to the court for decision and judgment. That on April 15th, 1901, the court having fully considered the cause, the allegations and evidence, found the issues for defendants, and entered judgment dismissing plaintiff's complaint. That said judgment so rendered by said court has not been appealed from or taken up to any appellate court of Arizona by any writ of error or any other proceedings. That at the time said judgment and decree was made and entered in Maricopa County, and for a long time prior thereto, plaintiffs in this action were stockholders in the Cobre Grande Copper Company.

That the suit in the State of New York is still pending, and that all the other suits mentioned in plaintiff's complaint were dismissed or otherwise disposed of by final judgment prior to the commencement of this action.

The Court further found that about November, 1898, and prior thereto, defendant Greene owned certain property in Sonora, Mexico, and had options to purchase other properties there, being the same mentioned in plaintiff's complaint.

That in said November, Greene executed an option on the property owned by him in Sonora, and other property for which he had contracts, to defendant Mitchell; that said option provided that Mitchell should pay in cash upon the execution of the contract, $12,500.00, and the balance of $237,500.00 as follows: $37,500 to be paid on or before November 26th, 1899, $100,000.00 on or before November

26th, 1900, and $100,000.00 on or before November 26th, 1901.

That about April, 1899, Greene and Mitchell, with the assistance of other parties, organized the Cobre Grande Copper Company under the laws of Arizona. That 199,995 shares of the capital stock of said Company were delivered to Mitchell in consideration of his options from Greene, which option between Greene and Mitchell was assigned to the Cobre Grande Company subject to the rights of Greene therein. That the Cobre Grande Company then entered into the possession of said property and began to operate the same, and was in possession in September, 1899.

That about October, 1899, controversies arose between the Cobre Grande Company and Greene over said option and the right of possession to said mining property, and on or about that time Greene entered into possession of said property. Thereupon, the Cobre Grande Company brought the suit mentioned, in the courts of Sonora, Mexico, to regain possession of said property, and also instituted suit No. 3437 in Maricopa County to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell, and thereafter assigned to the Cobre Grande Copper Company.

That in suit No. 3437, a temporary injunction was granted restraining the Phoenix National Bank as escrow agent of the parties, from delivering said escrow papers to Greene, and also restraining Greene from demanding or receiving them from said bank.

That while this litigation was in progress, a majority of the stockholders of the Cobre Grande Company, comprising stockholders to the extent of 115,049 shares, entered into a pooling agreement, whereby all of said shares were delivered to defendant Gage with power to vote the same at all meetings of the stockholders, and that after said stock was pooled and while the pooling contract was in force, said stockholders granted to defendant Gage, the holder of said stock in pool, the right to dispose of and sell the same at his discretion.

That on January 5th, 1900, Gage, as Trustee, entered

into an option contract with Orne for the sale of said stock at $2.50 per share. That on March 30th, 1900, Gage, as Trustee, entered into a like contract with L. H. Chalmers for the sale of 101,000 shares at the same price. That on June 2nd, 1901, he entered into a similar contract with Chalmers, as agent, for the sale of 101,000 shares upon the same terms and conditions, and that on the same day Chalmers made a written declaration that he was acting for W. H. Dowe, of New York, and his representatives; and on the same day Dowe declared in writing he was acting for defendant Costello and Hallenborg, plaintiff, in this action, and H. H. Adams, J. Shirley and Senator De Boe.

That under this last option said parties purchased 16,000 shares of the capital stock of the Cobre Grande Company and paid $2.50 per share for the same.

That said contract, like all the others, has been forfeited and lapsed for failure of the parties to comply therewith, among whom was the plaintiff Hallenborg.

That afterwards plaintiff Hallenborg and defendant Costello opened negotiations with Gage, and undertook to procure an option from him for the purchase of said stock held by him as trustee for $2.50 per share.

That plaintiff Hallenborg in this matter was represented by Grant R. Bennett, under a power of attorney from Hallenborg to represent him, and who personally opened negotiations in behalf of Hallenborg to procure said option for the purchase of said stock held by said Gage. That defendant Costello was present at this time, which occurred about October, 1900.

That various other contracts were drawn up and submitted for the consideration of the parties trying to effect a deal, and that the form of the contracts which were drawn, was agreeable to and in conformity with the views and agreement expressed by Hallenborg through his attorney, Bennett, and was consented to by Hallenborg and his attorney, Bennett; but objections were raised by Costello, and that Hallenborg being unable to or not desiring to enter into said contract alone, and without Costello, the same was not for that reason signed.

Various other contracts were suggested with like tenor and import, all of which were consented to by the said Hallenborg and the Cobre Grande Company, but were not satisfactory to Costello, and were not signed for that reason.

That these negotiations were kept up between Hallenborg and Costello on the one part, and Gage as Trustee, on the other, until about the first week in December, 1900, and nothing resulted therefrom.

That thereupon Gage opened negotiations with Greene to sell him the stock, and that Greene offered to purchase the same *upon better terms than any one else had offered.* That Gage consulted the Directors and a large majority of the stockholders of the Cobre Grande Company, and they urged him to enter into a contract with Greene for the sale of said stock; that said stock represented by said Gage comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties; and thereafter, on the 12th of December, 1900, he entered into the contract of that date, mentioned in plaintiff's complaint.

That after said contract was made, a meeting of the Board of Directors and a meeting of the stockholders of the Cobre Grande Company was held, and said contract was ratified in its entirety by said Directors and by a majority vote of the stockholders at said meetings. Said Hallenborg being present at the stockholders' meeting, protesting against the ratification of said contract.

That said Greene complied in all respects with said contract of December 12th, 1900, and paid for said stock in full, according to the contract price.

That said stockholders accepted the money so paid to Gage by Greene, and ratified said contract, except plaintiff Hallenborg, who declined to be bound thereby.

That said contract of December 12th, 1900, was entered into by Gage in good faith with the full knowledge and consent of the Directors of the Cobre Grande Copper Company, *and upon the advise of counsel of the Cobre Grande Copper Company that the Company could not suc-*

cessfully maintain its suit, No. 3437, and with the belief on his part that said contract was to the best interest of said Company and its stockholders.

That no agreement was made between Gage or any other persons whereby any of the directors were to derive, or did derive any benefit or gain whatsoever, except such benefits as they derived from the sale of their stock.

The Court further found that the $25,000 mentioned in the contract of December 12th, 1900, was for the purpose of discharging certain outstanding notes due and owing by the Cobre Grande Copper Company to its creditors, and was paid by Greene and used in paying said creditors.

That the $30,000 cash, mentioned in said contract, was for the purpose and it was intended by the parties to be turned into the treasury of the Cobre Grande Company to pay its debts, and was paid into the treasury of the Cobre Grande Company.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company, mentioned in the contract, or the $30,000 which Greene had a right to pay in lieu thereof, together with the $30,000 last above mentioned, was intended by the parties to be paid into the treasury of the Cobre Grande Copper Company for the purpose of paying its indebtedness outside of the $25.000 in Finding 9 last above mentioned, a portion of which indebtedness said Hallenborg claims in this action, and that the same was paid in cash by Greene to Gage, and by him into the treasury of the Cobre Grande Copper Company.

That the 5,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in said contract agreed to be paid to said Gage, was intended by all the parties as compensation to Gage for services rendered by him as President of the Cobre Grande Company, and as compensation for his time, labor, trouble and attention given to the Company's business, and for money advanced to and for said Company, and for expenses paid in attending to the affairs of said Company, and in connection therewith, and was paid in cash, to wit: the sum of $50,000.00.

That the 5,000 shares of the stock of the Greene Consolidated Copper Company mentioned in said contract as

agreed to be paid to Chalmers, Baker and Bennett and Herndon & Norris, attorneys for the Cobre Grande Copper Company, was intended to be paid for services rendered to said Company in various litigations, and that $50,000 was paid in cash in lieu thereof, and was distributed among said attorneys, and that their services were reasonably worth said amount, and there was no evidence to the contrary.

That the note of Costello mentioned in the contract of December 12th, 1900, was conditioned upon the Cobre Grande Copper Company obtaining possession of said property in Mexico. Said note was not to be paid until ninety days after recovery of possession. The note was turned over to Costello under the terms of said contract.

The Court further found that the only property now in possession of the Cobre Grande Copper Company within the jurisdiction of the court, is the money held by the Treasurer of said Company, which was paid to him as part of the proceeds of the agreement of December 12th, 1900.

Finding XI is: That the temporary restraining order granted in this action, enjoining defendants from carrying out the terms and provisions of the contract of December 12th, 1900, and dismissing all of the actions then pending in behalf of the Cobre Grande Company, and enjoining the Phoenix National Bank from delivering any of the papers and documents held by it in escrow evidencing title held by the Cobre Grande Company to the mining property described in plaintiff's complaint, was modified, and that that part of it enjoining the Phoenix National Bank was dissolved upon the ground that the District Court of Maricopa County had rendered its decision in the suit of the Cobre Grande Company against Greene and others adversely to said Cobre Grande Copper Company, and that as part of the judgment of said Court the Phoenix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands, there is nothing before the court except an application for the appointment of a Receiver.

As conclusions of law from the facts as above stated, the

court decided that plaintiff was not entitled to any relief whatsoever; that the application for the appointment of a Receiver should be denied and the plaintiff's complaint be dismissed; that defendants recover their costs, and the court ordered judgment and decree accordingly.

The above contains a statement of all the facts found by the court, and they are all supported by competent testimony free from objection. Indeed no attack is made on them, and this court will not review them.

The prayer of plaintiff's complaint is, that plaintiff have judgment; that the Cobre Grande Company and the defendants, its directors, officers, etc., be enjoined from discontinuing, or causing to be discontinued, or dismissed the actions pending in New York, Texas, in Maricopa County, and in Sonora in the Republic of Mexico, and that a mandatory injunction issue out of the court directing the Cobre Grande Company, and the defendant, its officers, directors, etc., to prosecute and pursue in its behalf, all actions brought by any of the defendants herein for the recovery of said property, or any property rights of the Cobre Grande Company; that plaintiff be brought in and made party plaintiff to said actions as far as it may be necessary to protect his rights, and it be ordered that he have the right to intervene in the suits pending in Arizona, New York, Texas or elsewhere. That the defendants Gage, Adamson, Costello and O'Keefe be removed as directors, president and secretary; that a receiver be appointed to take possession of the property of the Cobre Grande Company, and to protect same, and to prosecute the aforesaid suits, claims, etc., against Greene, Mitchell, their confederates and agents, and the remaining defendant corporations herein, and to defend the Cobre Grande Company from the conspiracies of said defendants, and to operate said mines, and that defendants Greene and Mitchell be restrained from receiving from the Phoenix National Bank the papers constituting and evidencing the title to said property; that the Phoenix National Bank be restrained from delivering said papers to Greene and Mitchell, or to any other person except the Cobre Grande

Company, or said receiver. That the time for the payment of the installment of $37,500, and all other installments under said contract for the purpose of said properties of the Cobre Grande Company be extended to a reasonable time after it shall be restored to the possession of said mines. That defendants Greene, Mitchell, Cananea Consolidated Copper Company, and the Greene Consolidated Copper Company be required to account to the Cobre Grande Copper Company for said property, including the products of the mines, supplies, materials, etc., and be required to pay any amount found due on such accounting, and for such other and further relief as may be just, etc.

It will be seen by the findings above stated, that all of the suits except the New York suit, had been dismissed or disposed of by final judgment before this action was commenced, and that that suit is being prosecuted to-day by Mr. Hallenborg, the plaintiff in this case, and without the intervention of a receiver.

That all of the defendants who were officers or directors of the Cobre Grande Copper Company, and whom plaintiff prays may be compelled to prosecute the said actions, had ceased to be officers, directors or agents at the time the action was commenced.

That the Phoenix National Bank had delivered the papers and documents constituting and evidencing the title to the property in controversy, to Greene or the Greene Consolidated Copper Company before this action was commenced under the command of the District Court of Maricopa County, No. 3437, and there was no attempt towards an accounting.

It is apparent therefore, that the court could not comply with the prayer of plaintiff's complaint as to these matters, and that there was really nothing before the court except an application for the appointment of a Receiver as the court found.

ARGUMENT.

The appellees submit the following propositions:

I.

In no event can the Cobre Grande Copper Company have a cause of action against W. C. Greene, the Greene Consolidated Copper Company or the Cananea Consolidated Copper Company, and for this reason the judgment should be affirmed.

II.

Under the pleadings and evidence, irrespective of the judgment in Texas and of the District Court of Maricopa County the agreement of December 12th should be declared valid.

III.

The judgment of the District Court of Maricopa County is a bar to any action which a receiver, if appointed, might bring, and for this reason the judgment should be affirmed.

IV.

The judgment of the Texas court is a bar to any action which a receiver, if appointed, might bring, and for this reason the judgment should be affirmed.

V.

The court has no power to appoint a receiver for the sole purpose of instituting litigation.

VI.

Even if the court had such power the plaintiffs have their remedy as minority stockholders, and the exercise

of such power is discretionary; and the judgment of the lower court declining to exercise such discretion is not subject to reversal.

POINTS.

I.

The District Court and Supreme Court of Arizona have both found that there was no actual fraud. That Gage in signing the agreement of December 12th acted in good faith, and as advised by his attorneys, to the best interests of the Cobre Grande Copper Company.

It is to be presumed that Greene and the Greene Consolidated Copper Company knew that Gage was acting in good faith, and therefore, whatever redress the minority stockholders of the Cobre Grande Copper Company may have against Gage, they have none against Greene or the Greene Consolidated Copper Company, who, dealing at arm's length with Gage and those representing a majority of the stock of the Cobre Grande Copper Company, and their being no actual fraud, had the right to consider the contract made as valid and binding upon their adversaries in the negotiations leading up to it, and to enjoy the benefits of the same, if any.

As a matter of course, therefore, it seems that the Cobre Grande Copper Company and all of its stockholders have no redress against Greene and those whom he represented. The judgment, therefore, should be certainly affirmed as to Greene and those whom he represented, and inasmuch as it appears that the sole purpose for which a receiver is asked is to prosecute a claim against the Greene interests, the entire judgment should be affirmed, even if it should be held that such judgment would be without prejudice to the plaintiffs to prosecute in the name of the Cobre Grande Copper Company any claims which they may undertake to establish against Gage and the defendants associated with him.

II.

CONSIDERATIONS REGARDING THE CONTRACT OF DECEMBER 12, 1900.

Before proceeding to a discussion as to whether the court had the power to appoint a receiver or whether in the event that it had, it abused its discretion in not doing so, it is suggested that under the allegations of the complaint and the facts as found by the District Court and the Supreme Court of Arizona, the action of the directors of the Cobre Grande Copper Company ratifying the agreement of December 12th cannot be set aside.

The court has found that there was no fraud in the execution of the contract of December 12th. (Finding VIII, p. 151.)

It has also found (Finding 9, pp. 151-152) that as direct consideration for the contract of December 12th, $185,000 was paid by the Greene interests to the Cobre Grande Copper Company if the $50,000 paid for services to Gage be deemed a payment to said company; and that in any event the remaining $135,000 was paid by the Greene interests to the said company as such consideration.

Even if there were constructive fraud, the action of the directors of the Cobre Grande Company constituted under the pleadings and evidence the valid act of that company.

In order that the action of the directors of the company be avoided, it is not sufficient that fraud be shown. It must also be established that the action of the directors was injurious to the interests of the company; that it was a wanton destruction of its rights.

Whatever may have been the form of the proceedings which took place between Greene and the Greene Consolidated Copper Company and Gage and the other directors of the Cobre Grande Company on or about the 12th of December, 1900, the obvious intent of the parties was to compromise the litigation which was pending.

There is no proof, or attempt to prove on the part of the plaintiff in this case that the Cobre Grande Company

had any undisputed rights other than the rights to litigate.

The suit which had been tried in the district court of Maricopa county, and whose decision was then under advisement by Judge Street, had been prosecuted with vigor. Success in such suit by the Cobre Grande Company meant appeals in American Courts and a long and dubious litigation in the Republic of Mexico. Defeat in such suit rendered such company hopelessly insolvent, and the claims of its creditors and the shares of its stockholders would have become valueless.

It cannot be claimed, as a matter of course, and without evidence, that the compromise made on December 12, 1900, was not to the advantage of the Cobre Grande Copper Company.

Let it be assumed that such compromise was not as yet effective, but that the negotiations tending thereto had been virtually concluded, and that the papers consummating it were in course of preparation, and that this suit instead of being an action to declare such compromise agreement void, was an action to enjoin its execution.

Can it be seriously contended that any court at the instance of a minority stockholder would order the issuance of a writ of injunction restraining such compromise, and thereby imperil and hazard the rights of a vast majority of the stockholders?

The issuance of such injunction would prevent the execution of the contemplated agreement. The Judge of District Court of Maricopa County would hand down his decision, and if adverse to the Cobre Grande Copper Company, a vast majority of its stockholders could with propriety impute to the action of the court the total loss of the property which they had ventured in the enterprise.

Certainly no such injunction could have been granted except upon strong proof that the compromise was manifestly to the disadvantage of the Cobre Grande Copper Company.

It is, therefore, respectfully insisted that in the absence of any proof to this effect, and in the face of the finding

of the court to the contrary, it is not proper that this agreement should be set aside.

Upon proper evidence it is for the court to decide whether the contract alleged to be fraudulent is a fair one or not, with power to set it aside if it is manifestly unfair.

2 *Cook on Corporations,* Sec. 649, p. 1459, 5th Ed.

"And even though the boards of directors of two corporations are the same, and one buys out the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage."

2 *Cook on Corp.,* Sec. 658, 5th Ed., p. 1512.
Smith v. *Ferries,* 51, p. 710.

"If the minority stockholders object to the contract the Court will consider it and will sustain it if fair and set it aside if unfair."

Lyman v. *Kansas City R. R.,* 101 F., 636.

"In the absence of fraud *and unfairness* the minority may not defeat the whole body of associates respecting the security common to all."

Shaw v. *R. R. Co.,* 100 U. S., 605.

"It is well settled that a director may deal with his corporation. He may advance it money by way of loan or sell it property. Such contracts are voidable at the instance of the beneficiary, but are not void, and in order to avoid them, injury must be shown."

Copsey v. *Sacramento Bank,* 66, p. 7.

The authorities are conclusive that even when a director makes a contract with a corporation, if such contract be

approved by the stockholders, it is valid as against the dissent of a minority of the stockholders.

2 *Cook on Corp.*, Sec. 649, 5th Ed., p. 1458.

> "The action of the stockholders validates the contract even where nine out of thirteen directors were personally interested."
>
> *Leavenworth* v. *Chicago R. R. Co.*, 134 U. S., 688;
> *Nye* v. *Storer*, 168 Mass., 53.

In *Bill* against *Western Union Telegraph Company*, 16 Fed., page 14, the court, at page 19, holds as follows:

> "If it should be assumed that a majority of the stockholders of the lessor have adopted, or are willing to adopt the act of the directors, notwithstanding they were also directors of the lessee, the complainant is without remedy and without equities, as by permission of the statute such lease is within the legitimate discretion of the corporation. It would not be equitable or just that a single stockholder, or a majority of the stockholders, should be permitted to defeat the wishes and thwart the interests of the majority. It is an implied condition of the association of stockholders in a corporation that the majority shall have authority to bind the whole body in any transaction within the corporate powers."

It is also found in the eighth finding of fact that the contract of December 12th "was entered into by Gage in good faith, with the full knowledge and consent of the directors of the Cobre Grande Copper Company, *and upon the advice of counsel of the Cobre Grande Copper Company that the company could not successfully maintain this suit.*"

Even if it be admitted that the finding that a director acted in good faith is a conclusion of law, as argued by the counsel for the appellant, it cannot be contended that the finding that Gage had been advised by his counsel that the

Cobre Grande Copper Company could not successfully maintain its suit, is other than a most material finding of fact.

If the directors of the Cobre Grande Copper Company believed honestly and fairly upon advice of counsel that the Cobre Grande Copper Company would be defeated in its litigation, it was not only clearly within their right, but it was their absolute duty to effect the compromise which they did.

In *Gamble* v. *Queens County Water Co.*, 123 N. Y., 91, a contract was made with one Mullins, Secretary and Treasurer and Director of the Queens County Water Co., by which the corporation agreed to pay him $110,000 in new stock and bonds, in payment of property belonging to him, which the Trial Court found to be of the value of less than $61,000. A meeting of the stockholders was held, at which 497 shares out of a total of 500 were represented, and 467 shares were voted upon in favor of the adoption of the resolution, while 30 of the plaintiff's shares were voted upon by him in opposition thereto, and 3 shares were not voted upon.

The court says:

> "There were a majority of shareholders and a majority of shares voted upon in favor of such resolution without counting the defendant Mullins or his shares, although he voted upon them in favor of such resolution. In so doing he committed no legal wrong. *A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self-interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote upon their own stock vote upon it in the light solely of their own interest,* or, at least, in what they

conceive to be their own interest. *Their action resulting from such votes must not be so detrimental to the interests of the corporation itself, as to lead to the necessary inference* that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that *their action is a wanton or fraudulent destruction of the rights of such minority.* In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders. These views are exemplified in the comparatively recent English case of *N. W. T. Co. v. Beatty,* (L. R. (12 App. Cas.) 589), where one of the directors in a company contracted with his colleagues to sell to the Company a vessel which he owned for a price named. The contract was in fact a fair one, but it was admitted to be voidable, and it was held that the vendor director had a right at a meeting of the shareholders to vote in favor of ratifying such contract and concluding such purchase, and that his conduct was not to be regarded as oppressive towards the minority of shareholders because he individually owned a majority of the stock. It was said that a resolution of a majority of the shareholders upon any question with which the company was competent to deal, was valid and binding upon the minority. *A voidable contract, it was also said, might be ratified or affirmed by a majority of shareholders at a proper meeting, provided that such ratification was not brought about by improper means, and the contract itself was not fraudulent or oppressive towards the minority. Baggallay, L. J.,* said that great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders voting in that character in general meeting were to be examined and their votes practically nullified if they also stood in some fiduciary relation to the company.

"I think that where the action of the minority is plainly a fraud upon, or, in other words, is really oppressive to the minority shareholders, and the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders suing in his own behalf and in that of all others coming in, etc., to enjoin the action contemplated, and in which action the corporation should be made a party defendant. It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the shareholders that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. *Generally, the rule must be that in such cases the will of the majority shall govern. The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least,*

to enjoin the carryiny out of the opposite policy. This is no business for any court to follow."

The Cobre Grande Copper Company had an asset which was a chose in action. A receiver is asked in this case for the sole purpose of determining the value of such asset by prosecuting such chose in action. That the directors and stockholders of the company had the right to settle the litigation cannot be disputed, and any settlement made by them for a consideration would be binding upon the company unless such consideration were grossly inadequate to the value of the chose of action. The plaintiffs have submitted no evidence whatsoever with respect to the value of this chose in action.

The value of a chose in action depends upon two elements, both of which are essential to its having any value whatsoever.

(1) The probability of success in the litigation;

(2) The value of a judgment if obtained.

It is respectfully submitted that there is no evidence whatsoever as to the probability of success in the litigation. The plaintiff proved that there had been litigation. But in declining to offer evidence as to the merits of such litigation, he leaves his case entirely barren of proof as to the chances of success. It is therefore under the evidence impossible for the court to find that a settlement for $135,000 was not a most advantageous one for the company.

These stockholders represented by Gage had given three successive options upon their stock at the price of $2.50 per share, and, at the same time that the agreement of December 12th was executed, Gage was endeavoring earnestly in their behalf to procure Hallenborg and Costello to take an option upon their stock at $2.50 per share. Therefore, the owners of 107,000 shares of stock had nothing to gain by the most successful litigation, except $2.50 for each share of stock. Of course, no creditor could hope under

the most felicitous circumstances to obtain more than the full amount of the debt due him. On the other hand, if no settlement had been made and the litigation had been decided adversely to the Cobre Grande Company, the creditors and stockholders would have lost their all. At this juncture Greene offers while the litigation is still in doubt to give to all the creditors, and to all the stockholders everything which victory could secure to them. The offer of Greene assured to every creditor and every stockholder of the company, except Hallenborg, everything that such creditors and stockholders might, after victory hope or desire to get, and it assured to Hallenborg for his stock a sum of money per share which he had himself fixed as a fair value therefor after a successful issue of the litigation.

It is respectfully submitted that had Gage refused the offer of Greene simply in order that one stockholder might indulge his appetite for speculation, such refusal on his part would have been a gross abuse of his trust.

III.

It might be argued that in view of the fact that the stock of Addicks was not included in the terms of sale under the agreement of December 12th, his rights as plaintiff are upon a different and stronger ground than those of Hallenborg. In answer to such contention, it is submitted in the first place that it is the testimony of Gage that Greene agreed to buy the stock of any of the minority stockholders at the same price; and in the second place, that as a matter of fact Greene (p. 87, fol. 131) did offer Addicks $3 per share for his stock, which offer Addicks refused.

But it may be claimed that the mere fact that the agreement of December 12th did not provide for the purchase of the shares of the minority, and did provide for the purchase of the shares of the majority was a fraud upon the minority—that the surrender of the Cobre Grande Company's rights, without provision for the minority similar to that

made for the majority, is in itself a fraud, at least constructively; that the minority are entitled to better protection against the results of such fraudulent agreement than is afforded by the mere willingness of Greene to place them on even terms with the majority—that they are entitled to have their rights secured by decree of court; and, as collateral to this, it may be said that since Greene is chargeable with notice of the constructive fraud described, the rights of the Cobre Grande Company surrendered to him were taken subject to the equity of the minority shareholders, and that therefore, the minority are entitled to have the agreement annulled, and to have the rights surrendered restored to the Cobre Grande Company.

If, however, it is true, as we fully believe and assert, that the agreement of December 12th was a perfectly fair one—all this merely amounts to saying that the minority shareholders have a right to receive $2.50 per share for their stock, and that they are entitled to have this right secured to them by decree of court; for, if the agreement of December 12th was rescinded and declared void, and the rights of the Cobre Grande Company restored to it, the effect of such action would be to place the Cobre Grande Company in possession of a chose in action which it, or Hallenborg on its behalf, would be entitled to assert by means of litigation—the results of which, to say the least, would be doubtful. This litigation the directors of the Company would be entitled to compromise and settle upon any fair and honest terms, and no protest or objection upon the part of minority shareholders would avail to prevent this.

Cook on Corporations, Sec. 750.
Donohue v. *Mariposa Land? Etc. Co.,* 66 Cal., 317.
Chambers v. *Chambers & McKee Glass Co., et al.,* 39 Atl. Rep., 822.

And particularly must this be true when the directors are supported in such action by a large majority of all the stock in the company.

It should be remarked, in passing, that there is a broad and entirely evident distinction between the disposition of all the property of an active company and the settlement of a law suit prosecuted by a company which has no other enterprise and no other assets, but which had not been organized to prosecute such law suit. In one case, the very enterprise that the stockholders have agreed among themselves to carry on is terminated by the board of directors, whose power is in its very nature limited to the carrying on of the enterprise; while, in the other case, the litigation of the controversy is not the object of the company's organization, the shareholders have not agreed to embark in the prosecution thereof as the business of their association, and the power of the directors is therefore not limited by the interests of the situation and the management of such prosecution. Moreover, if any such doctrine as is applied to the sale of all the property and assets of a going company were applied to the compromise and settlement of litigation, the result might easily, and might not improbably, be that a small minority of recalcitrant shareholders might deprive the great majority of all possibility of realizing anything whatever upon their shares. Certainly the law does not contemplate and will not sanction such an absurdity.

What, then, would be the situation? The directors of the Cobre Grande Company would be entitled, immediately upon the entry of a decree rescinding the agreement of December 12th, to enter into another agreement, upon exactly the same terms, save that it would provide for the purchase of the shares held by the minority interest in the Cobre Grande Company at $2.50 a share; and, since this agreement would have avoided the only objection that is expressly urged to the agreement of December 12th, it would be unimpeachable. Equity will not pursue any such circuitous route in attaining its ends. If the fact be that minority shareholders have not been provided for by the agreement of December 12th, and that they are entitled to have their interests conserved by a decree of Court —although the agreement of December 12th is otherwise a perfectly fair agreement—a Court of Equity may and

should give them a lien subject to the rights of creditors, upon the assets of the Cobre Grande Company, and in case those assets shall not prove sufficient to discharge such lien, will decree that Greene and his associates shall take and pay for the shares at the rate of $2.50 per share, under penalty of a rescission of the agreement of December 12th in case they fail to make such purchase and payment. The case of *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed., 625, which is one of the cases principally relied upon by Hallenborg, is ample precedent for such a decree.

In that case the directors had made a sale of the property of a corporation to another corporation which was the holder of a majority of the shares of the first. The transaction had been fully consummated. The court found that it was within the power of the directors to make sale of all the property of the company when such sale had been sanctioned by a majority of the shareholders; that the minority could have no right to prevent the same being fairly made. In this case, however, the interests of the minority had not been properly provided for. The court held that the sale must stand, but that it would ascertain the value of the interests of the minority shareholders and give to those shareholders a lien therefor upon the assets of the old company in the hands of the new.

There is one clause in this contract which shows the perfect fairness with which Mr. Gage and Mr. Greene were dealing. Under his power of attorney Mr. Gage had the right of absolute disposal, and if Mr. Gage had made an absolute sale, Hallenborg could not have been heard to call it into question, as Greene's purchase would have been absolute and undisputed. But it was placed in the contract to avoid any possible controversy, that if any of the stockholders did not desire to sell, that Mr. Gage could withhold from delivery to Mr. Greene so much of the stock as the owners preferred to retain, provided Gage delivered to Greene 51 per cent. of the same. This was written specially by Mr. Gage for himself and his own protection, and when he sent the check for $4,000.00 to Hallenborg, he stated in his letter containing same that if Mr. Hallenborg did not

wish to sell for $2.50 he could return the check and he would return the stock to him. Mr. Hallenborg accepted that clause of his contract, returned the check and accepted the stock; he received the stock, therefore, under the terms of the contract, from his attorney in fact, acting for him. Mr. Gage would have had the right to have withheld it if by delivery he would have been unable to deliver to Greene 51 per cent. of the stock. Hence Hallenborg received this stock under and by virtue of the contract, and in consideration thereof. It was the only way he could get the stock away from Mr. Gage, where he had placed it. The consideration was good and valuable, and in receiving this stock under this contract, he ratified and consented to, as a matter of law, all the terms of this contract, and is bound by and estopped by it. Mr. Greene made his contract as an entirety, and he is entitled to enforce the whole contract, and to receive this stock under such circumstances is a ratification of the whole contract, and he (Hallenborg) cannot be heard to dispute it.

IV.

The Maricopa Judgment.

The judgment entered in Suit No. 3437 in the District Court of Maricopa County is not void and cannot be collaterally attacked.

The Court had jurisdiction of the parties and of the subject matter, and its judgment stands until reversed on appeal or until a new trial is granted. "A judgment is a vested right in the parties by whom it is recovered. If it is sought to review, correct, cancel or annul it, it must be done either *in the Court in which it is pronounced, or in the appellate tribunal.*"

> *York* v. *Cartwright,* 42 Texas, 141-2;
> *Voorhees* v. *Bank of U. S.,* 10 Pet., 449;
> *Thompson* v. *Tolmie,* 2 Pet., 157;
> *Hall* v. *Law,* 102 U. S., 461.

The rule is, that while judgments of inferior Courts must show jurisdiction, jurisdiction will generally be presumed in the case of Superior Courts; but, if want of jurisdiction appears on the face of the record of the judgment of a Superior Court, the judgment is void. Where there is jurisdiction in the Court to act, its judgment, until reversed or attacked by some direct proceeding to annul it, is valid and cannot be collaterally attacked.

Forbes v. *Hyde*, 31 Cal., 347-8-9;
Galpin v. *Page*, 18 Wall., 350;
Voorhees v. *Bank of U. S.*, 10 Pet., 449;
Lamp Chimney Co. v. *Brass & C. Co.*, 91 U. S., 659-661;
Hall v. *Law*, 102 U. S., 461-464;
Mattingly v. *Nye*, 8 Wall., 370;
Comstock v. *Crawford*, 3 Wall., 396.

The important question then is, does want of jurisdiction appear on the face of the judgment rendered in the District Court of Maricopa County? To ask the question is to answer it.

Under the rule laid down in *White* v. *Crowe*, 110 U. S., 187, and other cases cited, plaintiffs would not be entitled to relief even in an action directly assailing the judgment, for the reason that they could not aver and prove that they had a good cause of action on the merits, it being apparent from the record that they rely upon an option for the purchase of the Sonora mines which they have not complied with, or offered to comply with, and it is now too late. *Hansbrough* v. *Peck*, *supra;* and the allegations of plaintiff's complaint, if Judge Sloan's Court had jurisdiction, are wholly insufficient to entitle them to any relief in any Court under every rule of practice known to Courts of Chancery. The matters required to be shown in suits to set aside judgments are fully set forth in *Whitney* v. *Kelley*, 94 Cal., at pp. 153 *et seq.*, and it is sufficient to say here, that plaintiff's complaint does not meet the requirements.

In *Avegno* v. *Schmidt*, 113 U. S., 301-2, the Supreme

Court say: "The decree of a court of competent jurisdiction cannot be collaterally attacked by averring and proving that there was a good defense to the suit if the defendant had chosen to make it."

The contention on the part of plaintiffs that they are not bound by the decision of the District Court of Maricopa County is untenable.

In *Hawkins* v. *Glenn*, 131 U. S., 329, the Court say: "A stockholder is so far an integral part of the corporation that, in view of the law, he is a privy to the proceedings touching the body of which he is a member," then quotes from *Sanger* v. *Upton*, 91 U. S., 56, 58, as follows:

"It is not necessary that the stockholders should be before the Court when the order was made, any more than they should have been there when the decree of bankruptcy was pronounced.

"The plaintiff in error could not in this action question the validity of the decree, and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either except by a separate and direct proceeding had for that purpose."

The remedy of plaintiffs, if any they have, is to sue in Maricopa County directly, to vacate the judgment in No. 3437. This Court cannot retry that case in this one; otherwise one Court of concurrent jurisdiction would review the judgments of another, and litigation would never end.

V.

The El Paso Judgment.

The judgment in the suit in El Paso, Texas, rendered , 1900, is also *res adjudicata* of the substantial issues in this case, so far as the defendants, Greene, Mitchell and the Cananea Consolidated Company are concerned. The Greene Consolidated Copper Company and the Phoenix National Bank, of Phoenix, were not parties to that suit, but, of course, if that suit is *res adjudicata*

as to Greene and the Cananea Consolidated Copper Company, that disposes of this suit, because, if, as between the Cobre Grande Copper Company and the Cananea Consolidated Copper Company, it is held that the Cobre Grande Copper Company has no right to the property in question as against the Cananea Copper Company, there can be no cause of action against the Greene Consolidated Copper Company, which simply owns stock of the Cananea Consolidated Company, or against the Phoenix National Bank.

In the complaint in the present action, it is said:

> "The defendant, the Greene Consolidated Cop-
> "per Company, after having by the means aforesaid
> "got into possession of the said mines, proceeded
> "to extract ore therefrom and to turn it into cop-
> "per matte and ship said matte to various
> "points and places in the United States, and there-
> "upon the Cobre Copper Company, *claiming under*
> *"the agreement made between Greene and Mitchell*
> *"and assigned to and owned by it to be the owner*
> *"of the ore in said mines,* in or about the months of
> "January, 1900, and August, 1900, brought actions
> "of replevin, or in the nature of replevin, to recover
> "possession of the matte so shipped, which actions
> "were brought at the City of New York, in the
> "State of New York, and at El Paso, in the State
> "of Texas, and thereupon the Greene Consolidated
> "Copper Company, or some of its agents, attorneys
> "or confederates put in an adverse claim or demand
> "to the same, and the litigation in regard to the
> "said matte (commonly known as the 'Matte Suits')
> "is still pending and undetermined."

And, again:

> "Each and every of said litigations * * * were
> "a part of the dispute and controversy aforesaid
> "originating out of and connected with the claim of
> "said Greene and his agents, including the Can-

"anea Consolidated Copper Company and the Greene
"Consolidated Copper Company to get control and
"possession of all the property of the Cobre Grande
"Copper Company, and especially of the mining prop-
"erties aforesaid, and each and every one of said
"actions and proceedings which were begun and com-
"menced by the Cobre Grande Copper Company or
"on its behalf, was meritorious and well-founded
"in law and in equity, and all were necessary steps
"and proceedings to defeat the fraudulent schemes
"and designs of said Greene and his confederates, as-
"sociates and agents as aforesaid, and to save and
"protect the property and existence of the said Cobre
"Grande Copper Company."

It is contended by the plaintiff that the judgment in the El Paso suit went off on a technicality, or for some reason or other, being a judgment in a replevin suit, it is not *res adjudicata* as to the issues in this suit.

Of course, there is no such doctrine as that no judgment in a replevin suit can be *res adjudicata* in an equity suit. The sole question is, were the issues in the replevin suit the same as those in the equity suit? An inspection of the pleadings in the El Paso suit and of the testimony that was put in, shows that the most important issues in the present case were disposed of in the El Paso suit.

The claim is made in this suit that the Cobre Grande Company had, and still has, the right to the possession of certain mines; that at the time the deeds were deposited in escrow, Mitchell was put into possession under an agreement which, read in connection with the escrow agreements, meant that he was to be allowed to retain possession for the purpose of making enough to pay the installments due under the contract with Greene, and that the Cobre Grande Company, as Mitchell's successor, had the same right of possession that was given to Mitchell, and that because the Cobre Grande was ejected in October, it was excused from making payment November 26th, of $37,500, and should be excused from making such payment until a reasonable time

after the Cobre Grande Company is again put in possession. The basis of this claim in the present suit is that the agreement under which Mitchell went into possession constituted an agreement by which he was entitled to remain in possession until, while so remaining in possession, he failed to make a payment of an installment due.

This same claim was the basis of the El Paso suit. Most of the allegations in the El Paso suit, relating to the history of the contracts between Mitchell and Greene, the organization of the Cobre Grande Company and the alleged actions of Greene and Mitchell in October, 1899, read like the complaint in the present suit and in the suit in which the judgment of April 15th was rendered.

The complaint alleges, in the first paragraph, that the Cobre Grande Company holds the title to and *right to the possession of* certain mines and mining property, and describes the property, and further alleges that Greene, Mitchell and the Cananea Consolidated Copper Company illegally entered upon said mines and are illegally holding the same. On the trial of the case, practically the only evidence offered were the contracts between Greene and Mitchell and the Cobre Grande, and testimony as to the proceedings taken by Greene in October, 1899, at the mines. The question, then, of the right of possession, as between the Cobre Grande Company and the Cananea Consolidated Company, was directly in issue, for a replevin suit, or a suit in the nature of a replevin, or conversion suit, can be brought by one having the right of possession, just as well as by one having the actual possession.

It has been contended on the part of Hallenborg that the El Paso judgment is not *res adjudicata* here, because in that suit the title to the property could not be tried, nor could any equity of the Cobre Grande Company be proved, and that, as the Cobre Grande Company did not have the legal title to the property, it could not recover.

But it is well settled that in such a suit the question to be tried is not who has the legal ownership of the property, but who has the right to the possession of it, and the whole theory of the complaint in the Cobre Grande suit

and in the present suit is that the Cobre Grande Company had the right of possession under the original contracts made between Mitchell and Greene, and that because it was ousted from possession, it was excused from making the payment of $37,500 on November 26, 1899.

In 20 *Am. & Eng. Encyc. of Law,* at page 1050, it is said:

> "It may be laid down as a general proposition that the *right of possession* and not the *right of property* is the issue to be tried in this form of action. Therefore, in order to retain the action of replevin, the plaintiff must show a right of exclusive possession in himself, as against the defendant in the action."

And again, at page 1055:

> "If the plaintiff show a *prima facie right to the possession* of the property, he should obtain a verdict, unless the defendant prove a better title."

In every possible aspect of the El Paso case, it must be considered that the judgment therein was *res adjudicata* on the question of who had the better right to the possession of the property in question.

We have referred to the El Paso case as a replevin suit, because it has pleased the plaintiff to refer to it continually by that title. As a matter of fact, the suit was an equity suit, in which the possession of the matter was demanded, and the question at issue was the same that would have been at issue in the replevin suit, namely, who had, at the time the property was taken out of the ground, the legal right to possession of the ground.

VI.

There is no necessity for a Receiver to sue.

At bottom plaintiff's action is simply a suit to have a receiver appointed with authority to bring an action in

the courts of Sonora, Mexico, to recover the property which it claims belongs to the Cobre Grande Copper Company under the option executed by Greene to Mitchell in November, 1898, and by Mitchell transferred to the Cobre Grande Copper Company.

A receiver will not be appointed in such cases, for the following reasons:

(a) Because in Arizona every action shall be prosecuted in the name of the real party in interest. (Paragraph 1299, Revised Statutes of 1901.)

(b) Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name.

(c) Where the officers or managers of a corporation refuse, upon proper request, to bring such action, it may be brought in the name of the stockholders.

Wright v. *Oroville M. Co.*, 40 Cal., 20.
Ashton v. *Dashaway*, 22 Pac., 660, S. C., 23 Pac., 1091.
Hawes v. *Oakland*, 104 S. 450.
Davenport v. *Dows*, 18 Wall, 626.

A suit thus brought by a shareholder is in behalf of the corporation itself. In all such cases it is necessary to join the corporation as a party defendant, because the right asserted belongs to the corporation and it is an interested party.

Davenport v. *Dows*, *supra*.
Moyle v. *L. Admrs.*, 83 Cal., 579.
Bell v. *Donohoe*, 17 Fed., 710.
Danemeyer v. *Coleman*, 8 Sawyer, 51; S. C. 11 Fed., 97.
Hawes v. *Oakland*, 104 U. S., 450.
Smith v. *Dorn*, 96 Cal., 73.

A corporation though joined as a defendant, is so far considered the real plaintiff, that if it be a resident of the State in which the action is pending, and the stockholder plaintiff be an alien, the Federal Courts are ousted of jurisdiction.

Danemeyer v. *Coleman, supra.*

All of these cases and numerous other cases in all jurisdictions show that relief will be granted for the benefit of the corporation and for its stockholders, upon the suit of a stockholder without the intervention of a receiver.

In this Territory it has been settled by our Supreme Court that a minority stockholder has the right to institute a proceeding of the kind here, and to redress the wrongs and injuries similar to those complained of in this action, without the intervention of a receiver.

Wiser v. *Lawler,* 62 Pac., 695.

In the case of *Burns* v. *The City of Atchison*, 29 Pac., 582, the Court decides this precise question. It says:

> "It is said that the equitable jurisdiction of the Court to appoint receivers is not to be doubtingly exercised, and never where there is any other adequate remedy; but in this case, as has been stated, there is neither authority nor necessity for providing the City of Atchison with a representative or receiver. It is a competent party in any proceeding to protect its rights as a stockholder, and if the officers of the corporation have made fraudulent contracts, or are engaged in transactions which will result to the injury of the corporation or the city, as one of its stockholders, it may maintain an action in its own name to protect its own or the interests of the corporation, or to obtain any equitable remedy to which it is entitled. Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name; but where the officers or managers of the corporation refuse, upon proper

request, to bring such action, it may be brought in the name of the stockholders. *4 Amer. & Eng. Enc. Law,* 280, and cases cited.

It is conceded by both parties that, if a cause of action exists in favor of the city in this case, it may be prosecuted in the name of the city; and, if that is true, what reason is there for the appointment of a representative of the city, and what authority is there for the substitution of another as plaintiff in its stead? The counsel for the receiver argue at great length and cite numerous authorities to sustain the right of the city as a stockholder to bring the action, and thereby has furnished an argument against the appointment of a receiver, and his substitution in the place of the city. If a cause of action exists in favor of a stockholder, and the corporation refuses to proceed upon proper request, the city, as a stockholder, is a real and competent party to bring the action, and there is no necessity or reason in substituting a next friend or receiver to sue for it."

VII.

The Court in this action and under the proof, has no right or authority to appoint a receiver, because no ultimate relief is sought, except the mere appointing of a receiver.

In the case of *Murray* v. *Superior Court,* 129 Cal., 632; 62 Pac., 191, the Court uses this language:

> "There is of course no such thing as an action distinctly brought for the appointment of a receiver. Such an appointment when made is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the Court to make the appointment, necessarily presupposes that

an action is pending before it instituted by some one authorized by law to commence it."

This is in accordance with all the authorities found in the books on the subject.

In *Enc. of Pl. & Prac.*, Vol. 17, p. 682, the author says:

"The appointment of a receiver is not the ultimate end and object of litigation, but is merely a provisional remedy to control and preserve property pending litigation, that the relief awarded, if any, may be effective."

The same doctrine is laid down by Mr. High in his work on Receivers, Sec. 6, pp. 7 and 8; and

"The appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure, whose effect, temporarily, at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the Court determining the rights of the parties. It is, therefore, not to be exercised doubtingly, but the Court must be convinced that the relief is needful, and that it is the appropriate means of securing an appropriate end. It is regarded as a severe remedy, not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss."

High on Receivers, Sec. 3;
Smith on Receiverships, Sec. 2, says:

"The law of receiverships is peculiar in its nature, in that it belongs to that class of remedies which are only ancillary or provisional, and the appointment of a receiver does not affect either directly or indirectly, the nature of any primary right, but is

simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. * * * It leaves the parties as they have placed themselves as determined by the final judgment or decree of the Court."

See also *Pom. Equity,* Paragraphs 171, 1319 and 1330;
Miller v. *Bowles,* 58 N. Y., 253.

POINT VIII.

A Court of Equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person, except in cases of public or *quasi* public corporations, such as railroads, which are required to be kept going concerns, or in favor of judgment creditors, who have liens, or mortgagees who have liens, or in cases of infants, lunatics, and formerly married women; because the effect of the appointment is to dissolve the corporation, and it having received its life from the State by its charter or general law, the State only can dissolve it. Ever since the decision in the Dartmouth College case, it has been held that a corporation is a contract entered into between the sovereignty and the corporation. This contract cannot be annulled or interfered with by any action on the part of the Courts. On the contrary, they have upheld them, and for this reason clauses have been inserted in almost every State constitution reserving to the State the right to modify or repeal the charters.

In case of *Neal* v. *Hill,* 16 Cal., 150, this question was carefully considered by the Supreme Court of California, and it was there laid down as settled law that the appointment of a receiver must necessarily result in the dissolution of the corporation, and in that event the Court will have accomplished in an indirect way that which in this proceeding it has no authority to do directly. That it was well settled that a Court of Equity, as such, has no jurisdiction over corporate bodies, for the purpose of re-

straining their operations or winding up their concerns, and the Court add, "that we do not find any such power has ever been exercised in the absence of a statute conferring the jurisdiction."

1873, the California legislature adopted part of the provisions of the New York Code, but omitted to adopt certain independent provisions of that code, to the effect that a receiver of the property of the corporation could be appointed upon the petition of the execution plaintiff, when the execution issued upon a judgment rendered against the corporation had been returned unsatisfied in whole or in part, and when a corporation should have been declared insolvent for one whole year, or for that length of time had neglected or refused to pay its notes or other evidences of debt, or had for one year suspended its regular business.

In the celebrated *French Bank Case*, 53 Cal., 495, the Court held that these omitted provisions created rights in favor of private persons that did not exist before and enlarged the powers of the Courts of Equity in the State of New York by directly and in terms authorizing them in such cases to appoint receivers of the property of corporations upon application made to them by creditors, stockholders and other private parties instituting proceedings for that purpose, and held: That in the absence of any such authority conferred by statute, that a Court of Equity had no jurisdiction to make such an appointment, either under the statute or under the usages of Courts of Equity. In Arizona there is no statute conferring jurisdiction on Courts of Equity to appoint receivers except by usages of Courts of Equity. Section 1541, Rec. Stats. Arizona, 1901, is in substance the same as Subd. 6, Sec. 564 of California Code of Civil Procedure, which limits the power of the Court to appoint a receiver to cases allowed by usage of equity.

These decisions have been affirmed by the Supreme Court of California in

Murray v. *Superior Court,* 129 Cal., 631; 62 Pac., 191;

State I. & I. Co. v. *San Francisco,* 101 Cal., 146,

and cases cited from New York and other States.

Fisher v. *Superior Court,* 110 Cal., 140, and various other decisions in that State.

The Court of Appeals of New York in *Decker* v. *Gardner,* 124 N. Y., 334, holds that the jurisdiction to appoint receivers of corporation is wholly statutory and never was exercised by a Court of Chancery until their jurisdiction was enlarged by statute.

We have heretofore stated, that where the plaintiff has an interest in the property, for instance by vendor's lien or a mortgage, or by virtue of a judgment lien, and that the property is being wasted, that pending foreclosure proceedings, a Court of Equity has the power without statute to appoint a receiver to preserve the property until the litigation can be settled and determined; but this is only by virtue of his interest in the property and that it is being wasted.

See *Cook on Corporations,* Vol. 2, Secs. 746-747, 4th Ed., where the New York Statutes and rule are discussed.

In the case of the *Attorney General* v. *The Utica Ins. Co.,* 2 Johnson's Chancery, 375, Chancellor Kent holds that a Court of Equity has no visitorial powers over corporations and no power to remove the officers appointed by the charter to manage the business of the corporation; and in the same case held that the directors of a corporation are accountable to a Court of Equity for a fraudulent breach of trust.

The same effect—Matter of *Binghampton Gen. Electric Works,* 143 N. Y., 263.

Atty. General v. *Niagara Bank,* Hopkins Ch. (N. Y.), 354.

Waterbury v. *Mchts. Union Express Co.,* 50 Barb. (N. Y.), 157.

Verplank v. *War Ins. Co.,* Edwards Ch. (N. Y.), 84.

Hand v. *Dexter,* 41 Ga., 454.

Hamilton v. *Accessory Transit Co.*, 3rd Abbott Pr. N. Y., 255.
French v. *Accessory Transit Co.*, 3rd Abbott Pr. N. Y., 255.
French v. *Gifford*, 30 Iowa, 148.
Vanderbuilt v. *Central R. Co.*, 43 N. J. Eq., 669.

In Arizona, in the Revised Statutes of 1887, Sec. 233, among other things the following powers are conferred upon corporations:—Subdivision 2—To sue and be sued by the corporate name; subdivision 6, to make contracts, acquire and transfer property possessing the same powers in such respects *as private individuals now enjoy;* and Sec. 234, in subdivision 5, provides by what officers or persons the affairs of the corporation are to be conducted and the times at which they are to be elected.

The Articles of Incorporation of the Cobre Grande Company introduced in evidence specifies that the business of the company shall be managed by a Board of Directors. The statute and the articles of incorporation, taken together, prescribe the powers of the Cobre Grande Company; the tenure of its officers and the mode of their election. What power has a court of equity to set aside the statute or impose other conditions upon them, otherwise than as provided in the statute? The charter measures its powers and the manner of conducting its business and the persons who shall conduct it.

The cases above referred to also hold that the only method of forfeiting the charter of a corporation is by proceeding in the nature of *quo warranto,* and this is in exact accordance with the rule prescribed in the Revised Statutes of Arizona of 1901. Paragraph 28 provides: "that no corporation formed under the laws of this Territory shall be dissolved, or its rights impaired except by judicial procedure;" and the corporation, having received its life through the legislative grant above mentioned, can only be forfeited by the power that granted it. Par. 772 is a further limitation upon the powers of the court. That section provides that the corporation shall not be dissolved prior to the period fixed upon in the articles of incorpora-

tion, except by a majority vote of the members, except a different rule is adopted in the articles, and Par. 775 provides: "that corporations whose charters expire by their own limitations or by the voluntary act of the stockholders may, nevertheless, continue to act for the purpose of closing up the business, but for no other purpose, unless renewed as in this chapter provided."

Where the statute prescribes a particular method for dissolving a corporation, that method must of course be pursued.

People v. *P. & T. Co of C.*, 38 Cal., 172-173.

We have shown that the appointment of a receiver is in effect the dissolution of the corporation; then it must follow that the appointment sought for in this action is prohibited by the sections of the Revised Code above quoted.

A corporation has the same power over its corporate property, and is capable of taking and holding property, as wholly as natural persons, except in so far as they are restrained by statute. That under this general power, unless restrained by statute, a corporation may dispose of the whole of its corporate property for any lawful purpose without the assent of its stockholders.

People v. *P. & T. C. of C.*, 38 Cal., 171-172.

This case holds that property of a corporation can be disposed of without the assent of the stockholders, under a section of the California Code which is nothing like so broad as the paragraph of the Revised Statutes of Arizona of 1901, which gives the directors the power to make contracts as freely as individuals.

In 1880 the California legislature passed a statute the first section of which provides as follows: "That it shall not be lawful for the directors of any mining company to sell, lease, transfer or otherwise dispose of any part of the mining ground owned or held by said corporation, nor to purchase or obtain in any way additional mining ground unless such act be ratified by the owners of at least two-

thirds of the capital stock of such corporation," and provision is made as to the method of ratification.

In the case of the *Granite Gold Mining Co.* v. *Meginness*, 50 Pas., 269, 118 Cal., 132, the Supreme Court of that State (California) in construing that statute, held, that the general presumption of the power of corporations to buy and sell real property must prevail except in those cases where the facts appearing of record show that the case is within the restrictions of the Act of 1880, and that a sale is valid without the assent of the stockholders, unless it appears that the sale and conveyance are of its mining ground, for the reason that the restriction of the statute applies not to a sale of its real property generally, but only to that of its mining ground. In other words, that the plaintiff in that case was required to show that he was within the exception of the statute.

In *Willamette Mfg. Co.* v. *Bank of British Columbia*, 119 U. S., 191, the question was whether a corporation had the right to mortgage its franchise.

Appellants in that case, as in this, argued that a corporation could not do that because it destroyed the purposes for which the corporation was formed.

The statute creating the franchise, gave to the corporation "the exclusive right of the hydraulic powers and privileges created by the water it takes from the Santiama River, and declares that it may use, rent, *or sell*, the same, or any portion thereof as it may deem expedient."

Mr. Justice Miller says: "The charter itself seems to have given unlimited power to the Company to sell everything it had * * * and held that the power to sell included the power to mortgage." In other words, the Supreme Court in that case held what the courts have always held, that the charter is the measure of the power of the corporation, and that it could do anything that its charter authorized it to do.

The statute in Arizona, like the statute of Oregon, mentioned in the *Willamette Company* case, 119 U. S., 191, is an enlargement of the powers of the corporation.

Plaintiffs in their brief claim that the result of the contract of December 12th, 1900, destroys their rights, and

even go so far as to claim that the property of the Cobre Grande Copper Company was disposed of without consideration, and that they were deceived by concealment of secret provisions with reference to the $60,000 paid by Greene, which went into the treasury of the Company.

In the first place, Mr. Gage did not, nor did anybody, attempt to sell, or in fact sell any of the property of the Cobre Grande Copper Company. In the next place, there was no concealment whatever. The only property sold by Mr. Gage as agent or representative or otherwise, were the shares of the several stockholders who entered into the pooling agreement, and which were owned by them in private proprietorship. Findings 5, 6, 7 and 8.

The court found that Mr. Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company and they urged him to enter into said contract with Greene for the sale of the stock. That said stock represented by Mr. Gage (Participating in said contract), comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

IX.

The appointment of a receiver is one of discretion in the Court to be exercised as an auxiliary to the attainment of the ends of justice; is of high and unusual character, and is never exercised because of the fact that the appointment can do no harm. In order to obtain the appointment of a receiver, plaintiff must show, in cases where the property is in possession of defendant: first, that he has a clear right to it; and, secondly, that the possession of the property by defendant was obtained by fraud.

It is also held that the discretion of the Court to appoint a receiver will not be exercised where no perceptible benefit will result from the appointment, but great confusion and difficulty, and probably great injury to both parties, while

no injury will apparently be caused by failing to make the appointment.

Hamburg Mfg. Co. v. *Edsall,* 8 N. J. Eq., 142.

The record shows that the Cobre Grande Company is not in possession, but that Greene or the Greene Company is, and in the absence of any proof or finding of fraud, the presumption of law is that they are rightfully so. Fraud is never presumed but must be proved.

We have shown in the preceding pages of this brief that plaintiffs can secure by suit brought by them on behalf of the Cobre Grande Company every relief that a receiver or that the company itself could obtain if brought in its own name, and that it is unnecessary to appoint a receiver to sue on their behalf.

We respectfully submit that the judgment of the lower Court should be affirmed; and if the view of the counsel for the appellees as expressed in the first five points of this brief should be approved, it is respectfully suggested that an affirmance upon any one of such grounds would terminate this long and expensive litigation.

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